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FUJIAN JINHUA INTEGRATED CIRCUIT CO., LTD.

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

v.

UNITED MICROELECTRONICS
CORPORATION, *et al.*,

Defendants.

CASE NO.: 3:18-cr-00465-MMC

**DEFENDANT FUJIAN JINHUA
INTEGRATED CIRCUIT CO., LTD.'S
OPPOSITION TO THE
GOVERNMENT'S
MOTION *IN LIMINE* NO. 6
TO ADMIT CASE AGENT AND
EXCLUDE OTHER FACT
WITNESSES PURSUANT TO FED. R.
CRIM. P. 615; [PROPOSED] ORDER**

Judge: The Honorable Maxine M. Chesney
Trial Date: February 14, 2022

1 **I. INTRODUCTION**

2 In the government's Motion *in Limine* No. 6 to Admit Case Agent and Exclude Other Fact
 3 Witnesses Pursuant to Fed. R. Crim. P. 615 (the "Motion" or "Mot."), ECF No. 241, the government
 4 seeks an order (1) excluding all fact witnesses from trial until after they testify but (2) permitting FBI
 5 Special Agent Cynthia Ho to be present during trial notwithstanding that she is also on the
 6 government's witness list. While Jinhua recognizes that this Circuit generally permits one case agent
 7 to be exempt from any exclusionary order under Rule 615(2) so that he or she can assist the
 8 government during trial,¹ Jinhua requests that the Court issue an order requiring Special Agent Ho
 9 to testify before any excluded witness so as to prevent Agent Ho from benefitting from hearing all
 10 the other witnesses' testimony before taking the stand.

11 **II. ARGUMENT AND AUTHORITIES**

12 Rule 615 of the Federal Rules of Evidence provides as follows:

13 At a party's request, the court must order witnesses excluded **so that**
 14 **they cannot hear other witnesses' testimony.** Or the court may do
 15 so on its own. But this rule does not authorize excluding: (a) a party
 16 who is a natural person; (b) an officer or employee of a party that is
 17 not a natural person, after being designated as the party's
 representative by its attorney; (c) a person whose presence a party
 shows to be essential to presenting the party's claim or defense; or
 (d) a person authorized by statute to be present.

18 Fed. R. Evid. 615 (emphasis added). Excluding witnesses "serves both to reduce the danger that a
 19 witness's testimony will be influenced by hearing the testimony of other witnesses, and to increase
 20 the likelihood that the witness's testimony will be based on her own recollections." *United States v.*
 21 *Hobbs*, 31 F.3d 918, 921 (9th Cir. 1994); *Taylor v. United States*, 388 F.2d 786, 788 (9th Cir. 1967)
 22 ("The exclusion of witnesses from the courtroom during trial is a time-honored practice designed to
 23 prevent the shaping of testimony by hearing what other witnesses say."); *see also* Notes of Advisory
 24 Committee on Proposed Rules to Fed. R. Evid. 615 ("The efficacy of excluding or sequestering
 25 witnesses has long been recognized as a means of discouraging and exposing fabrication, inaccuracy,
 26 and collusion.").

27
 28 ¹ See e.g., *United States v. Thomas*, 835 F.2d 219, 223 (9th Cir. 1987).

1 The concerns underlying the purpose of Rule 615 do not vanish simply because the non-
 2 excluded witness is a case agent. In fact, the Ninth Circuit has noted that “it may be a good practice
 3 to require case agent witnesses to testify first.” *United States v. Valencia-Riascos*, 696 F.3d 938,
 4 943 (9th Cir. 2012). *See also United States v. Mitchell*, 733 F.2d 327, 329 (4th Cir. 1984) (“[B]etter
 5 practice suggests that if the [exempt] agent is to testify, he should testify as the Government’s first
 6 witness, unless . . . there [are] good reasons otherwise.”); *In re United States*, 584 F.2d 666, 667 (5th
 7 Cir. 1978) (holding that the agent designated under Rule 615(2) as a government representative could
 8 not be excluded; however, it was proper to order the agent to testify at an early stage of the trial).

9 The government has not provided any detail about the contours of Ms. Ho’s testimony, so it
 10 is difficult for Jinhua to determine the effect hearing other witnesses testify would have on Special
 11 Agent Ho’s testimony. The government provides a conclusory statement that she is considered by
 12 the government as an “integral part of the trial team” and that she has a “great familiarity with the
 13 case,” but provides no factual details. (Mot. at 2:13-21.) In light of this uncertainty, requiring Special
 14 Agent Ho to testify first ensures that her testimony will not be shaped or tailored, even if
 15 unintentionally and in good faith, by hearing the witnesses and evidence before her, and would help
 16 ensure the integrity and accuracy of the proceedings before the Court. *See Valencia-Riascos*, 696
 17 F.3d at 943 (noting that requiring the government to introduce its case agent first is “good practice”).

18 Importantly, the government has not provided any good reason why Special Agent Ho could
 19 not testify first, which would eliminate Jinhua’s justifiable concerns. Without good reason as to why
 20 Special Agent Ho must testify later in the case, this Court should issue an order that Special Agent
 21 Ho testify before any witnesses who must be excluded from the courtroom pursuant to Rule 615.

22 CONCLUSION

23 For the reasons set forth above, Jinhua respectfully requests that the Court issue an order that
 24 Special Agent Ho should be required to testify at the beginning of the government’s case, before any
 25 excluded witness. Jinhua does not otherwise oppose the government’s motion.

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3 Dated: December 22, 2021

4 SKADDEN, ARPS, SLATE, MEAGHER & FLOM, LLP

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6
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